

approval from respondent. Respondent asks the Board to reverse the ALJ's Award and find that claimant's outstanding medical bills are not respondent's responsibility or, at the least, that respondent is only responsible for the first \$500.00 of unauthorized medical.

Claimant contends that the ALJ's Award should be affirmed.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein and the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact:

Claimant began working for respondent on September 28, 2009, as a custodian. Claimant suffered an injury to his left leg on December 29, 2009. Claimant stated that he had been buffing floors over the winter break and, after he finished, headed out for his lunch break. He got to his vehicle and realized he forgot to clock out and pulled up to the front drive to go in and clock out. On his way back to his vehicle, claimant slipped and fell on a patch of black ice on the sidewalk, landing on his left ankle.¹ Claimant testified he had earlier shoveled that path in the snow, where the patch of ice was located and where he slipped, as part of his custodial duties two days earlier.² Claimant also admitted that it was not his job to take care of ice or snow for respondent, but that he had done so because, when he arrived, the crew had not yet cleared the snow. So, he cleared the area.³

Claimant felt pain once he hit the ground and began screaming for help. After a time someone heard claimant and called 911. Claimant stated that he could tell his ankle was bad because he was in a lot of pain and he could see his bone protruding from his leg and his foot was off to the side. Emergency personnel arrived on the scene and, upon evaluating claimant, determined he needed to be taken to the hospital. Claimant stated that Patty Clark, a co-worker, came out to make sure he was all right and called his parents. Ed Maichel, claimant's lead, also came out to see about him. At no time did any of respondent's employees offer any suggestions in regard to claimant's medical care or where he should be taken.⁴ Claimant was never told not to get in the ambulance. Claimant stated that although he went through orientation when he started working for respondent, there was a lot of information provided and there is no way he would have

¹ R.H. Trans. at 11.

² Ibid. at 20.

³ Ibid. at 54.

⁴ Ibid. at 18-19.

been able to remember what the procedure is for handling work injuries.⁵ He also stated that the procedures were posted in the teachers' lounge, but nowhere else, so he put the number to call with injuries in his cell phone. Claimant testified that he planned to ask Ron, another supervisor, if this posted procedure was the same for the custodial staff. However, before claimant could ask, he had his accident.⁶

Claimant was loaded into the ambulance and was immediately given pain medication, including morphine and nitrous oxide. Once he got to Overland Park Regional Medical Center, claimant's ankle was set and he was put in a room. At some point claimant received a call from Luke Padilla, a co-worker, who told claimant that he overheard a conversation that involved denying claimant payment of his medical expenses because he had clocked out.⁷ Claimant became concerned and asked his dad, Gary Mountain, to make some calls to find out what was going on. Claimant's dad also works for respondent as a custodian and, as of the time his December 7, 2010, had done so for over 7 years.⁸

Claimant did not hear anything from respondent on December 29, 2009, and the next day (the 30th), claimant had surgery to repair his left ankle. The surgery required screws and metal hardware to put the bones in his ankle back together.⁹ Claimant continued treatment with the trauma surgeon, Dr. Mark S. Humphrey, after surgery. A week passed and claimant never heard that his medical would not be paid. Claimant was told by Paul Sharp, respondent's coordinator of custodial services, that it was just a matter of how the expenses were going to be submitted and that the bills would be taken care of one way or the other.¹⁰ Claimant was not provided an authorized doctor under workers compensation during the first week. This concerned claimant and he sought legal counsel. Claimant's counsel contacted respondent and medical treatment was authorized under workers compensation with Dr. Humphrey.

Claimant treated with Dr. Humphrey for a while and, once released, was sent to Dr. Wheeler for therapy and training to strengthen his muscles. Claimant eventually returned to work with no restrictions.

Claimant stated that as he was lying on the ice with his leg and foot going out to the side, he was not able to think logically and was not able to participate in any of the

⁵ Ibid. at 58-59.

⁶ Ibid. at 59-61.

⁷ Ibid. at 22.

⁸ Gary Mountain Depo. (Dec. 7, 2010) at 4.

⁹ R.H. Trans. at 25.

¹⁰ Ibid. at 26.

decisions about where he should go or who he should call.¹¹ Claimant testified that his supervisor, who was present, did not offer any suggestions on what to do.

As a result of the injury, claimant has lost some range of motion in his ankle. He can only lift and bend so far and has a hard time positioning the ankle to pick things up under a table. He reported continued pain on both sides of his left ankle and has pain in his left knee and great toe.¹² Claimant testified that his condition causes him stress and, as a result, he has gained 30 pounds.

Ed Maichel, lead custodian, testified that he has been working for respondent for the last 5 years, starting as a regular custodian and, over the years, being elevated to lead custodian. Mr. Maichel has worked at Leawood Middle School for the last two years.

As lead custodian, Mr. Maichel has an area that he is responsible for cleaning and he relays any kind of information from the supervisor to the other custodians. Jim Hodson was the supervisor for the school.

Mr. Maichel testified that the first he learned of claimant's fall was when Patty Clark informed him sometime in the morning that there was a police car out in front of the building. He went out to see what was going on and saw claimant lying on the ground.¹³ He also recalled Ms. Clark taking claimant's cell phone to call his father. Mr. Maichel called his supervisor to let him know what had happened. He was waiting on a call back. In the process, claimant was transported by ambulance to the hospital. When Mr. Maichel heard from his supervisor, Mr. Hodson, he was told that claimant should not be transported in the ambulance because it was not covered under workers compensation, but by this time it was too late and claimant was being loaded for transport.¹⁴ Mr. Maichel testified that he felt the only way to get claimant transported for medical treatment was by ambulance. He did not feel comfortable picking claimant up and transporting him somewhere for medical treatment.¹⁵

Mr. Maichel testified that when he spoke with Mr. Hodson, they did not discuss how claimant's situation should be handled. He received no instruction on what to do.¹⁶ He also testified that there was a poster on display before the accident that contained

¹¹ Ibid. at 37.

¹² Ibid. at 39-40.

¹³ Maichel Depo. at 10-11.

¹⁴ Ibid. at 16.

¹⁵ Ibid. at 37.

¹⁶ Ibid. at 21-23.

the procedures to follow in case of a work injury.¹⁷ And yet the procedures were not followed. He testified that he told Mr. Hodson that it was too late to tell claimant that his medical was not going to be covered because the ambulance had already driven off. He later stated that he was close enough he might have been able to stop claimant but did not. Mr. Maichel also did not make any suggestion as to where the ambulance should transport claimant for treatment or what doctor he should see.¹⁸

Mr. Maichel knew that claimant had shoveled the sidewalk, but was not sure if rock salt had been put down. He was not concerned about it because it was the winter break and the front door was locked and not in use. He also indicated that it was no one's responsibility to shovel the sidewalks the day claimant was injured.¹⁹ Mr. Maichel stated that the custodians are not to use the front entrance and are to park in the back at the gym entry. So, he was not sure why claimant used the front entrance on the day of the accident. He assumed that claimant was attempting to get closer to the time clock so that it would take less time after he clocked out. He also assumed that claimant was on his way out from clocking out when he slipped and fell on the ice.²⁰

Sidney Cumberland, risk manager and safety coordinator for respondent, testified that he was on vacation the week claimant had his accident, returning to work on January 4, 2010. He testified that if someone called for him, the call would go to the secretary. If the secretary was gone, the call would then go to Mr. Cumberland's voicemail, which indicated that in the case of a medical emergency OHS-CompCare should be contacted.²¹

Mr. Cumberland testified that it would have been his expectation that claimant, through his pain and agony, could have called OHS-CompCare for instructions on what he needed to do.²² He also testified that if claimant had been unconscious, his instinct would be to call OHS-CompCare on claimant's behalf for instruction on what to do.²³ Mr. Cumberland testified that he was notified by Jim Hodson of claimant's accident on the day it happened. Mr. Cumberland was aware that an ambulance had been called. He advised that claimant was to be taken to OHS-CompCare. He received a second call

¹⁷ Ibid. at 63.

¹⁸ Ibid. at 32.

¹⁹ Ibid. at 53.

²⁰ Ibid. at 55.

²¹ Cumberland Depo. at 7.

²² Ibid. at 8.

²³ Ibid. at 8-9.

stating that it was too late. The ambulance had already left, taking claimant somewhere other than OHS-CompCare.²⁴ He then asked Mr. Hodson to fill out an accident report and take pictures of the scene. The situation would get handled when he returned from vacation.

In the process of trying to piece together what happened, Mr. Cumberland instructed Mr. Hodson to make sure claimant was taken to St. Luke's Hospital South for medical treatment, as that is the preferred location for workers compensation injuries that are life and limb threatening. However, Mr. Cumberland does not consider a broken leg to be life threatening. Therefore, claimant should have gone to OHS-CompCare for determination of his need for hospitalization at St. Luke Hospital South.²⁵ He stated that claimant could have been transported by the Blue Valley School District police department, or a supervisor could have taken claimant to OHS-CompCare.²⁶ He also stated that in the event an employee needs a gurney, one would be provided and the injured worker would be transported in the back of the police's Ford Explorer.²⁷ He acknowledged that respondent does not have the authority to direct the EMTs where to take an injured employee.²⁸ It appears, in claimant's case, the EMT recommended claimant go to Overland Park Regional Medical Center because his leg was at an odd angle and a trauma surgeon there was available at Overland Park Regional Medical Center to handle this type of injury.

Mr. Cumberland indicated that, because the ambulance ride and medical treatment were not authorized, respondent is only willing to pay \$500.00 of the charges as unauthorized medical.²⁹

Claimant's attorney asked Mr. Cumberland, on behalf of claimant, why "if everyone was trained that he should go to OHS, why did not anybody tell them that when his dad was calling everybody he could call?" And Mr. Cumberland responded, "[i]t was a little late at that point, I understand".³⁰ He also stated that he had left claimant a voicemail message with what he was supposed to do.

²⁴ Ibid. at 9-10.

²⁵ Claimant was taken to Overland Park Regional Medical Center, which is not part of the network of respondent's workers compensation carrier. (See Sharp Depo. at 27.)

²⁶ Cumberland Depo. at 49.

²⁷ Ibid. at 58-59.

²⁸ Ibid. at 15.

²⁹ Ibid. at 30.

³⁰ Ibid. at 40.

On January 5 or 6, 2010, Mr. Cumberland spoke to claimant and informed him that his treatment was not going to be covered because he did not follow department procedures and policies regarding work injuries. Claimant told him that he did not know he was supposed to contact OHS-CompCare.

Paul Sharp, respondent's coordinator of custodial services, testified that he has worked for respondent since 2005. Mr. Sharp was working on December 29, 2009, when claimant was injured. He testified that he learned about claimant's accident after overhearing a telephone conversation between Jim Hodson and Ed Maichel. He stopped and asked Mr. Hodson what was going on and was told what happened. It was at this point he began to try and get in touch with Sidney Cumberland to report claimant's accident. When he could not get Mr. Cumberland on the phone, he began to search for his cell phone number.³¹ Once he found the number, he gave it to Mr. Hodson, who talked to Mr. Cumberland.

Mr. Hodson was told by Mr. Sharp that the ambulance expense was not covered because claimant needed to go through OHS-CompCare. Mr. Sharp was told to tell claimant not to be transported by ambulance to the hospital, and he had Mr. Maichel run down to tell claimant this, but he did not have time to get to claimant to tell him this because the ambulance was driving off as he made it to the front door of the building.³²

Mr. Sharp testified that based upon what he was told by Mr. Maichel, who had seen claimant's leg at the scene of the accident, there was no doubt in his mind that claimant needed an ambulance to take him to the hospital because his leg was in pretty bad shape.³³ At his deposition, which was taken on June 21, 2010, Mr. Sharp stated that in the 5 years he has worked for respondent, this is the most serious injury he has seen.³⁴

Mr. Sharp testified that the procedure for handling injuries is that, first, OHS-CompCare is called for an opinion on the matter, and then OHS-CompCare determines if the worker should be seen at OHS-CompCare or referred to St. Luke's Hospital South for immediate/emergency care. And all of this goes through Sidney Cumberland. Mr. Sharp testified that he knew claimant was taken to the wrong hospital based on his conversation with Jim Hodson. He went on to relay to claimant's father, Gary (when he spoke with him over the phone while claimant was already in the hospital and receiving care for his injury), that OHS-CompCare should have been contacted before

³¹ Sharp Depo. at 12-13.

³² Ibid. at 15.

³³ Ibid. at 18-19.

³⁴ Ibid. at 21.

going to the hospital, but he did not mention that claimant was at the wrong hospital.³⁵ He told claimant and his father that one way or another claimant's bill would be covered under either workers compensation or Blue Cross and that the main thing was that claimant get better. He did not suggest that they change hospitals because it was not his role to do so.

Mr. Sharp testified that he also heard there was a question as to whether claimant's injury would be covered by workers compensation at all because claimant was not clocked in at the time.

Mr. Sharp testified that every custodian in his or her orientation was instructed to contact OHS-CompCare in the event there is an accident and injury. And that there are posters on display that give direction on what to do. However, the poster that was posted on the date of claimant's injury advised to call 911 in the case of a "life or limb emergency."³⁶

Eric Olson, a paramedic for Johnson County MED-ACT, testified that he was called out to an accident involving claimant on December 29, 2009. Upon arrival, he noticed claimant's ankle looked deformed. He described it as grossly angulated.³⁷ Claimant was promptly picked up and put in the back of the ambulance to be checked out and to get out of the cold.³⁸ Claimant's ankle was put in a splint, and he was given an IV of morphine and nitrous oxide.

Mr. Olson testified that he felt it was important to get claimant's ankle back in proper alignment as soon as possible to preserve the circulation in the foot. Therefore, Mr. Olson made the decision to take claimant to Overland Park Regional Medical Center, where claimant could quickly get the special trauma treatment he required for his injury.³⁹ He was not aware that claimant did not have surgery on his leg until the day after he was taken to the emergency room. Mr. Olson does not recall having any conversations with claimant about whether his accident was a workers compensation accident or about the protocols the school had in place for work accidents.⁴⁰ The other reason claimant was

³⁵ Ibid. at 27, 31.

³⁶ Ibid., Ex. 1.

³⁷ Olson Depo. at 9.

³⁸ Ibid. at 8.

³⁹ Ibid. at 11.

⁴⁰ Ibid. at 16.

not transported to a clinic is it is against Johnson County MED-ACT protocols to do so. They only transport to emergency rooms.⁴¹

Gary Mountain, claimant's father (hereinafter Mr. Mountain), testified that he also works for the school district, but at a different school from claimant, and that he learned of claimant's accident after he received a telephone call, while he was on vacation, about claimant having an accident. Mr. Mountain and his wife immediately went to meet the ambulance at Overland Park Regional Medical Center. The doctors were working on claimant's leg when they arrived, and so Mr. Mountain went to the clerk's office to fill out some paperwork. Soon after that, Mr. Mountain received a phone call from Luke Padilla, a co-worker of claimant's, informing him that he overheard a conversation between supervisors Ed and Jim that because claimant was clocked out at the time of the accident for lunch, he was not eligible for compensation.⁴² Not long after, claimant got the phone call informing him that the medical treatment he was receiving was not covered.

Mr. Mountain immediately tried to find Sidney Cumberland, the risk manager, to find out what was going on. Mr. Cumberland was not available, so Mr. Mountain called claimant's supervisor, Tyrone Duckworth, who was also not available. And then he tried contacting Bruce Wilson, who was the "active supervisor" at the time of claimant's accident,⁴³ but he was also not available. And by this point, claimant was getting agitated and suggested he call his lead, Carol Hunke, to see if she could put him through to Mr. Wilson or Paul Sharp.⁴⁴ Mr. Sharp was not available, and after trying to find someone else, Mr. Mountain left a message for Mr. Cumberland. Mr. Mountain testified that when he left this message, the greeting he heard did not say that Mr. Cumberland was out of the office or in case of emergency to call OHS-CompCare.⁴⁵ While Mr. Mountain was on the phone, the doctor determined that claimant was going to need surgery and scheduled it for the next day.

Late in the day on December 29th, Mr. Mountain got a return call from Paul Sharp and was reassured that the situation with payment of the medical bills would be taken care of and that claimant should focus on getting better.⁴⁶ He testified that Mr. Sharp never told

⁴¹ Ibid. at 20-21.

⁴² Gary Mountain Depo. (Dec. 7, 2010) at 7.

⁴³ Ibid. at 8.

⁴⁴ Ibid. at 8.

⁴⁵ Ibid. at 20-21.

⁴⁶ Ibid. at 10.

him to contact OHS-CompCare. Claimant did not receive a call from Sidney Cumberland until after claimant had surgery on December 30 and had been sent home later that week.

Mr. Mountain did not attempt to talk with claimant about OHS-CompCare while he was in the hospital because claimant was heavily sedated because of his pain. Plus, Mr. Mountain was still trying to contact a supervisor. He had no idea that claimant had the number to OHS-CompCare in his cell phone and is not sure where he would have found the number. He was not sure if the school that claimant worked at had the same posters with emergency numbers as were posted at the school where he works.

Mr. Mountain stated that claimant's situation at the time was an emergency. He would never suggest claimant go to OHS-CompCare for that injury.⁴⁷

Mr. Mountain testified that the posters regarding work injuries that were up before the accident are not the same ones that are posted now. It was not long after the accident that a new yellow poster was put up. The new poster went into great detail about the procedures that needed to be followed in case of an emergency.

Dr. Michael J. Poppa, who practices occupational medicine, testified that claimant's work injury was not a simple fracture, but a fracture dislocation which was unstable and necessitated being protected in a manner not to cause further damage. And in his opinion, an ambulance was the proper avenue to use to make that happen.⁴⁸

Q. And, Dr. Poppa, do you have experience in evaluating the reasonableness and necessity of medical and hospital bills?

A. Yes.

....

Q. Based on your training and experience and a review of Mr. Mountain's hospital records from Overland Park Regional and your review of those three bills, those three exhibits, do you have an opinion to a reasonable medical certainty as to whether those bills represent reasonable and necessary treatment as a result of Mr. Mountain's accident of 12/29/09?

A. Yes.

Q. And what is your opinion?

⁴⁷ Ibid. at 31.

⁴⁸ Poppa Depo. at 18.

- A. Based on my experience, ongoing experience and current experience in occupational medicine, it is my opinion these bills were directly necessary and reasonable as far as payments for the treatment Mr. Mountain received as a result of his work injury, work accident.⁴⁹

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁵⁰

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵¹

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵²

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁵³

⁴⁹ Ibid. at 19-20.

⁵⁰ K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

⁵¹ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵² K.S.A. 2009 Supp. 44-501(a).

⁵³ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

It is well known that under the Kansas Workers Compensation Act (Act), a respondent has both the responsibility and the right to provide medical treatment.⁵⁴ As such, the respondent can provide reasonable instructions to its employees regarding who would be and would not be authorized. Here, respondent contends that claimant failed to follow those instructions and should be limited to a \$500.00 unauthorized allowance to cover approximately \$28,000.00 in medical expenses.

Respondent contends that a man, lying on a frozen sidewalk, with a badly broken ankle, while in extreme pain, should have the presence of mind to remember that he was to go to a clinic to obtain permission to go to an emergency room to obtain treatment for that badly broken ankle. Claimant failed to realize, as he was lying on that frozen sidewalk, with the badly broken ankle, that he was wrong to get into that ambulance that would have refused to transport him to a clinic anyway. Of course, claimant's supervisor, Mr. Maichel, who was a witness to claimant being placed into that ambulance, also failed to mention the need for claimant to go to the clinic.

When Mr. Sharp, respondent's coordinator of custodial services, talked to claimant's father on the day of the accident, he informed claimant's father that OHS-CompCare should have been contacted. But Mr. Sharp made no mention of having claimant moved to the proper hospital. He simply assured claimant and his father that the medical bills would be taken care of one way or another.

The ultimate determination as to where this claimant was taken for treatment of this badly injured ankle was made by Eric Olson, the paramedic for Johnson County MED-ACT. Mr. Olson's decision was based on the need for a trauma unit to treat what he described as a grossly angulated ankle. He also testified that had claimant or any representative of respondent requested he take claimant to the OHS-CompCare, he would have refused as they only transport to emergency rooms.

Respondent has not argued that the treatment received by claimant was, in any way, excessive or inappropriate, but merely that the initial contact should have been to OHS-CompCare. Respondent does not adequately answer the concerns expressed in its own postings directing that 911 be called in the case of an emergency. Claimant's condition was dire enough that Mr. Maichel would not have attempted to transport claimant to OHS-CompCare.

Here, respondent's own representatives, present at the time of the accident and witness to claimant being loaded onto an ambulance, failed to follow respondent's protocol. For respondent to suggest that claimant, while lying on a frozen sidewalk, with a badly broken ankle, should remember that protocol is disingenuous and borders on frivolous.

⁵⁴ K.S.A. 2009 Supp. 44-510h.

The Award, granting claimant medical treatment, without limiting him to the \$500.00 in unauthorized medical treatment, is affirmed.

CONCLUSIONS

Claimant is not limited to the \$500.00 unauthorized medical allowance. The Award, ordering respondent to pay, as authorized, for the medical treatment provided claimant after the accident on December 29, 2009, is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated March 10, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven J. Borel, Attorney for Claimant
Christopher J. McCurdy, Attorney for Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge